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No. 06-719

IN THE

Supreme Court of the United States

KENNETH BENDER, ET AL.,
Petitioners,

v.

DISTRICT OF COLUMBIA,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF IN OPPOSITION BY THE DISTRICT OF COLUMBIA

LINDA SINGER
Acting Attorney General for the District of Columbia

TODD S. KIM
Solicitor General

EDWARD E. SCHWAB
Deputy Solicitor General

*JAMES C. MCKAY, JR.
Senior Assistant Attorney General
Office of the Attorney General for the District of Columbia
Office of the Solicitor General
441 Fourth Street, N.W., 6th floor South
Washington, D.C. 20001
Telephone: (202) 724-5690
Attorneys for Respondent

**Counsel of Record*

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OPINION BELOW

The opinion of the D.C. Court of Appeals, Pet. App. at 1a-14a,[1] is reported at 906 A.2d 277 (D.C. 2006).

JURISDICTION

Contrary to petitioners' assertion, this Court does not have jurisdiction under 28 U.S.C. § 1254(1) (2000). That provision applies only to decisions of the federal courts of appeals as defined by 28 U.S.C. § 41 (2000). The basis for this Court's jurisdiction over decisions of the D.C. Court of Appeals is 28 U.S.C. § 1257 (2000), which defines that court as the "highest

[1] "Pet. App." refers to the Appendix to the Petition.

court of a State." 28 U.S.C. § 1257(b) (2000). *See* R. STERN, E. GRESSMAN, S. SHAPIRO, K. GELLER, SUPREME COURT PRACTICE §§ 2.2, 2.13 (2002).

COUNTER-STATEMENT OF THE CASE

A. Legislative Scheme

1. District of Columbia Income and Franchise Act of 1947

Shortly after the close of World War II, Congress enacted the District of Columbia Income and Franchise Act of 1947, Article I of the District of Columbia Revenue Act of 1947, PUB. L. NO. 80-195, 61 Stat. 328 (1947); D.C. Code § 47-1801.01 *et seq.* (2005) (the "1947 Tax Act"). The purpose of the Act is stated as follows:

> (a) It is the purpose of this Act to impose:
>
> (1) An income tax upon the entire net income of every resident and every resident estate and trust; and
>
> (2) A franchise tax upon every corporation, financial institution, and unincorporated business for the privilege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District . . . .

Id., Title X, § 1(a), 61 Stat. 349; D.C. Code § 47-1810.01(a) (2005).

The term "unincorporated business" is broadly defined as:

> . . . any trade or business, conducted or

> *nonresident*, statutory or common-law trust, estate, partnership, or limited or special partnership, society, association, executor, administrator, receiver, trustee, liquidator, conservator, committee assignee, or by any other entity or fiduciary, other than a trade or business conducted or engaged in by any corporation; and include[s] any trade or business which if conducted or engaged in by a corporation would be taxable under title VII of this article.

Id., Title VIII, § 1, 61 Stat. 345, D.C. Code § 47-1808.01 (2005) (emphasis added). However, unincorporated professional and personal-services businesses are exempted from the tax:

> The term "unincorporated business" does not include:
>
> (1) A trade or a business which by law, customs, or ethics cannot be incorporated;
>
> (2) A trade, a business, or a profession which can be incorporated only under Chapter 4 of Title 29 [Professional Corporations];
>
> (3) A trade or business in which more than 80% of the gross income is derived from the personal services actually rendered by the individuals or the members of the partnership or other entity in the conducting or the carrying on of a trade or a business and in which capital is not a material income-producing factor;
>
> . . . .

Id. An identical franchise tax is imposed on corporations, domestic and foreign, doing business in the District. *Id.*, Title VII, 61 Stat. 345; D.C. Code § 47-1807.02 (2005).

The 1947 Tax Act delegated to the Commissioners[2] the authority to prescribe rules (1) to determine formulas for allocation and apportionment of franchise taxes for multistate businesses, (2) concerning withholding of taxes, and (3) "as may be necessary and proper for [the Act's] enforcement and efficient administration." *See* D.C. Code §§ 47-1580a, 47-1586g, 47-1595 (1967).[3]

2. Home Rule Act

On December 24, 1973, Congress enacted the District of Columbia Self-Government and Governmental Reorganization Act, PUB. L. NO. 93-198, 87 Stat. 774 (1973); D.C. Code § 1-201.01 *et seq.* (2006) (the "Home Rule Act"), most of which took effect on January 2, 1975, after ratification by the District voters. The primary purpose of the Act was, "to the greatest extent possible, consistent with the constitutional mandate, [to] relieve Congress of the burden of legislating upon essentially local District matters." *Id.*, § 102(a); D.C. Code § 1-201.02(a) (2006). Thus, except for specific limitations, the Act provides

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[2]The three-member Board of Commissioners of the District of Columbia was established by the Organic Act of 1878, the Act of June 11, 1878, 20 Stat. 102, ch.180, D.C. Code vol. 1 at 104 (2001).

[3]In 1967, President Johnson promulgated Reorganization Plan No. 3 of 1967, 81 Stat. 948, D.C. Code vol. 1 at 125 (2001), which apportioned the Commissioners' functions between a Mayor-Commissioner and the District of Columbia Council, all appointed by the President. The functions transferred to the former Council (described as "quasi-legislative") included these three rulemaking functions pertaining to the 1947 Tax Act. *See* REORGANIZATION PLAN NO. 3 OF 1967, § 402(371), (372), (373), D.C. Code vol. 1 at 153 (2001). In 1975, these functions were transferred to the present, elected Council of the District of Columbia by § 404(a) of the Home Rule Act, D.C. Code § 1-204.04(a) (2006). *See* p. 4, *infra*.

that "the legislative power of the District shall extend to all rightful subjects of legislation within the District . . . ." *Id.*, § 302; D.C. Code § 1-203.02 (2006).

The Act establishes a traditional tripartite form of government, vesting the legislative power of the District in the Council of the District of Columbia, the executive power in the Mayor, and the judicial power in the District of Columbia Courts. *Id.*, §§ 404(a), 422, 431; D.C. Code §§ 1-204.04(a), 1-204.22, 1-204.31 (2006). The second sentence of § 404(a) also transfers to the newly created Council the quasi-legislative functions delegated by Congress to the Commissioners, which had been transferred to the former, presidentially appointed District of Columbia Council established by Reorganization Plan No. 3 of 1967.

The Act retains Congress's ultimate legislative authority over the District under Article I, § 8, clause 17 of the United States Constitution:

> Notwithstanding any other provision of this Act, the Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this Act, including legislation to amend or repeal any law in force in the District prior to or after enactment of this Act and any act passed by the Council.

Id., § 601; D.C. Code § 1-206.01 (2006). In addition, the Act provides certain specific limitations on the Council's legislative authority, including the following:

> (a) The Council shall have no authority to pass any act contrary to the provisions of this Act except as specifically provided in this Act, or to
>
> . . .
>
> (5) impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District . . . .

Id., § 602(a)(5); D.C. Code § 1-206.02(a)(5) (2006).

To ensure continuity, a savings clause preserves the effectiveness of the numerous existing Acts of Congress applicable exclusively to the District:

> No law or regulation which is in force on the effective date of title IV of this Act [January 2, 1975] shall be deemed amended or repealed by this Act except to the extent specifically provided herein or to the extent that such law or regulation is inconsistent with this Act, but any such law or regulation may be amended or repealed by act or resolution as authorized in this Act, or by Act of Congress . . .

Id., § 717(b); D.C. Code § 1-207.17(b) (2006).

3. District of Columbia Real Property Tax Revision Act of 1974

On September 3, 1974, nine months after the Home Rule Act was enacted but before the elected Mayor and Council took office on January 2, 1975, Congress enacted the District of Columbia Real Property Tax Revision Act of 1974, PUB. L. NO. 93-407, title IV, 88 Stat. 1036 (1974). That Act, which increased

the compensation of teachers, police, and firefighters, provides that:

> . . . the Council, in accordance with § 406 of Reorganization Plan No. 3 of 1967,[4] is authorized to change the rate of the taxes imposed under:
>
> (1) the District of Columbia Income and Franchise Tax of 1947 . . . .

Id., § 471(1), 88 Stat. 1064; D.C. Code § 47-504(1) (2005).[5]

Section 501 of the Act makes it clear that it is not intended to limit the authority of the Council under the Home Rule Act:

> Notwithstanding any other provision of law, or any rule of law, nothing in this Act shall be construed as limiting the authority of the Council of the District of Columbia to enact any act, resolution or regulation, after January 2, 1975, pursuant to the District of Columbia Self-Government and Governmental

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[4]Under § 406 of Reorganization Plan No. 3, D.C. Code vol. 1 at 158 (2001), the former Council's actions were subject to approval by the appointed Mayor-Commissioner.

[5]In accordance with § 404(a) of the Home Rule Act, D.C. Code § 1-204.04(a) (2006) (second sentence), the authority to change the rates for taxes imposed by Congress under the 1947 Tax Act was transferred to the elected Council of the District of Columbia on January 2, 1975. Pursuant to this authority, the Council has changed the franchise tax rate for unincorporated businesses, as well as corporations, so that the rate is currently 9.975 percent. D.C. Code §§ 47-1807.02(a)(4), 47-1808.03(a)(4) (2005). There is a minimum tax for both of $100. D.C. Code §§ 47-1807.02(b), 47-1808.03(b) (2005).

> Reorganization Act with respect to any matter covered by this Act.

88 Stat. 1066.

B. Facts

Petitioners (the "Benders") are residents of Montana, Florida, and Maryland who have ownership interests in four unincorporated businesses engaged in commercial real estate rental in the District. These businesses – not the Benders themselves – paid franchise taxes for calendar years 1999 to 2002 and fiscal years ending September 30, 2000, 2001, and 2002. Pet. App. at 2a. The Benders claimed that they were entitled to refunds totaling $241,815 on the theory that the tax was an income tax that burdened them personally, relying on the decision of the D.C. Court of Appeals in *Bishop v. District of Columbia,* 401 A.2d 955 (D.C. 1978), *aff'd,* 411 A.2d 997 (D.C.) (en banc), *cert. denied,* 446 U.S. 966 (1980). Pet. App. at 2a.

After the District of Columbia Office of Tax and Revenue denied their claims, the Benders challenged the ruling by filing an action in the Superior Court of the District of Columbia pursuant to D.C. Code § 47-3310(b) (2005). The Superior Court granted summary judgment in favor of the Benders. Although the court recognized that the franchise tax had been imposed by Congress, it held that the tax, as it applied to nonresidents, was effectively repealed by the Home Rule Act. The court reasoned that § 404(a) of that Act transferred to the Council the authority to promulgate regulations with respect to the 1947 Tax Act; the limitations on the Council's legislative authority under § 602(a)(5) of the Home Rule Act applied to the Council's exercise of this regulatory authority; and, hence, the unincorporated business franchise tax as a whole was invalid as applied to nonresidents. Pet. App. at 15a-30a.

The D.C. Court of Appeals reversed. In a unanimous decision, the court held that the unincorporated business franchise tax imposed by Congress in the 1947 Tax Act was not negated as applied to nonresidents by Congress's enactment of the Home Rule Act. Citing § 717(b) of the Home Rule Act, the savings clause, the court held that:

> . . . there was no inconsistency between the Home Rule Act and the Tax Act of 1947 because Congress, in the Tax Act of 1947, provided that there would not be a tax on the personal income of nonresidents but in the same legislation enacted the unincorporated business tax that had the effect of taxing that portion of the personal income of nonresident owners of unincorporated businesses derived from those businesses.

Pet. App. at 9a.

As evidence of Congress's intent to preserve the effectiveness of the 1947 Tax Act, the court cited § 471(1) of the District of Columbia Real Property Tax Revision Act of 1974, D.C. Code § 47-504(1) (2005), which "provided that the Council was 'authorized to change the rate of the taxes imposed under . . . the District of Columbia Income and Franchise Tax Act of 1947,'" and § 501 of the Tax Revision Act of 1974, 88 Stat. 1066, which provided that the Act may not be construed as limiting the authority of the Council under the Home Rule Act. Pet. App. at 5a, 9a. The court concluded that "[b]y giving the Council the right to determine the rate, Congress made it clear that the UB [unincorporated business] Tax remained in effect." Pet. App. at 9a.

The court distinguished its decision in *Bishop*:

. . . The problem addressed in *Bishop* was that the Council had exceeded its power conferred by Congress by actually purporting to repeal the Congressionally imposed "professional services" limitation. In substance, this court in *Bishop* held that the Council could not repeal a provision of the Tax Act of 1947 which excluded from the tax certain types of personal service income. 401 A.2d at 956-58. The *Bishop* court did not say that the District was precluded from taxing nonresidents "who operate an unincorporated business." *Id.* at 961. Conversely, in the instant case, the Council has not taken any action to amend the Tax Act of 1947 enacted by Congress; the Council has merely continued to exercise the power conferred by Congress to collect a tax imposed by Congress. The Tax Act of 1947 mandated that the UB Tax was payable by the individuals operating the unincorporated business. 61 Stat. at 346 (codified at D.C. Code § 47-1808.05 (2001)). Moreover, the UB Tax was not defined solely as a tax on residents but was specifically defined by Congress to include "that portion of the entire *net income* of every *nonresident* which is subject to tax under title VIII [Tax on Unincorporated Businesses] of this article." 61 Stat. at 343 (codified at D.C. Code § 47-1806.01 (2001)) (emphasis added). Thus, unlike the exclusion for personal services income, the Tax Act of 1947 specifically allowed for the taxation of nonresident personal income if that income is derived from the operation of an unincorporated business within the District of Columbia. . . .

Pet. App. at 10a-11a.

The D.C. Court of Appeals remanded the case to the Superior Court with instructions to enter summary judgment for the District. Pet. App. at 11a-12a. The Benders did not seek *en banc* rehearing.

REASONS FOR DENYING THE PETITION

A. Because the decision of the D.C. Court of Appeals involved an issue of local law only and was plainly correct, this Court's review is not warranted.

In *Pernell v. Southall Realty*, 416 U.S. 363 (1974), the Court stated that "[t]his Court has long expressed its reluctance to review decisions of the courts of the District involving matters of peculiarly local concern, absent a constitutional claim or a problem of general federal law of nationwide application." *Id.* at 367. The Court explained:

> . . . [T]he new court structure certainly lends additional support to our longstanding practice of not overruling the courts of the District on local law matters "save in exceptional situations where egregious error has been committed." *Fisher v. United States*, 328 U.S. [463,] 476 [(1946)]; *Griffin v. United States*, 336 U.S. [704,] 718 [(1949)]. This principle, long embedded in practice and now supported by the clear intent of Congress in enacting the 1970 Court Reform Act, must serve as our guide in the present case.

Id. at 368-369. The D.C. Court of Appeals did not commit "egregious error." To the contrary, the decision was plainly correct.

The Benders mischaracterize the franchise tax in question as one imposed on them by the Council of the District of Columbia. *See* Pet. at 22-23. That incorrect characterization is central to their argument. However, the tax was imposed by Congress when it enacted the 1947 Tax Act. Moreover, the limitation in the Home Rule Act on the *Council's* authority to impose a commuter tax does not affect the authority of the District to continue to collect the tax.

The Benders have never disputed that *Congress* has the power to impose a tax on unincorporated businesses operating in the District even though it may affect the personal income of nonresident owners of or investors in the businesses.[6] *See* U.S. CONST. ART. I, § 8, cl. 17; *Neild v. District of Columbia*, 110 F.2d 246, 249 (D.C. Cir. 1940) (delegation to Congress "is sweeping and inclusive in character, to the end that Congress may legislate within the District for every proper purpose of government"). Although Congress broadly delegated legislative authority to the District Government it created when it enacted the Home Rule Act,[7] it did not thereby forgo its legislative power over the District. Section 601 of the Act expressly retains

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[6]Nor have the Benders argued that they are within any of the exemptions from the tax. *See* D.C. Code § 47-1808.01 (2005). Moreover, payments by a business to an owner for services rendered for the business may be deducted from the business's income for purposes of calculating the franchise tax. *See* 9 D.C. MUN. REGS. § 104.1 (1998) ("Unincorporated businesses . . . shall be allowed an aggregate reasonable salary allowance for services rendered by the individual owners or members actively engaged in the conduct of the business" not to exceed 30 percent of the District net income).

[7]It is settled that Congress may delegate its legislative power over the District to any District Government that it creates. *See District of Columbia v. John R. Thompson, Inc.*, 346 U.S. 100, 106-107 (1953).

Congress's full legislative power over the District under the Constitution. It makes no sense to interpret the specific limitations on the *Council's* authority in § 602(a) of the Act, which immediately follows § 601, as placing any limitations on *Congress's* legislative authority.

Nor did the Home Rule Act diminish the force or effect of existing Acts of Congress pertaining to the District. The savings clause of the Home Rule Act, § 717(b), expressly continues the effectiveness of existing Acts of Congress, such as the 1947 Tax Act, by providing that "[n]o law or regulation which is in force on the effective date of title IV of this Act [January 2, 1975] shall be deemed amended or repealed by this Act except to the extent specifically provided herein or to the extent that such law or regulation is inconsistent with this Act . . . ." *See Citizens Association of Georgetown v. Zoning Commission of the District of Columbia,* 392 A.2d 1027, 1035 (D.C. 1978) (en banc).

There is no inconsistency between the 1947 Tax Act and the Home Rule Act. The Benders argue that § 602(a)(5) of the Home Rule Act prohibits "the D.C. Council's *application* of the unincorporated business tax to nonresidents." Pet. at i (emphasis added). However, the collection or "application" of a tax is not a legislative function that may be exercised by the Council, but rather an executive function.[8] Tax collection is the responsibility

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[8]The doctrine of separation of powers fully applies in the District. *See Convention Center Referendum Committee v. District of Columbia Bd. of Elections and Ethics*, 441 A.2d 871, 878 (D.C. 1980), *aff'd on rehearing*, 441 A.2d 889 (D.C. 1981) (en banc) ("The legislative history of the Self-Government Act makes it clear that Congress intended to establish a traditional doctrine of separation of powers for the government of the District."). The Council can exercise its powers only by passing acts or adopting resolutions, not by the "application" of legislation. Home Rule Act, § 412; D.C. Code § 1-204.12 (2006).

of the Office of Tax and Revenue in the Office of the Chief Financial Officer, a part of the Executive Branch of the District Government. D.C. Code § 1-204.24a(a), (c)(4) (2006). Hence, as the D.C. Court of Appeals concluded, the limitation on the *Council's* authority under § 602(a)(5) to enact a commuter tax has no effect on the District's collection of the unincorporated business franchise tax imposed by Congress.

The Benders do not address the reasoning of the D.C. Court of Appeals but simply assert, in a footnote, that the court should not have relied on the fact that Congress, in the Tax Revision Act of 1974, authorized the Council to "change the rate of the taxes imposed" by Congress in the 1947 Tax Act, *see* D.C. Code § 47-504(1) (2005), because the former Act "does not refer in any way to 'non-residents', or even the UB Tax itself." Pet. at 21-22 n. 19. The Benders do not even mention § 501 of the Tax Revision Act of 1974, 88 Stat. 1066, on which the court also relied, Pet. App. at 5a-6a, and which makes clear that the Act does not limit the Council's authority under the Home Rule Act.

However, these provisions of the Tax Revision Act of 1974 are highly significant. First, they make clear that the tax was "imposed" by Congress and not by the Council. Second, they confirm that the tax remained in effect after the enactment of the Home Rule Act and, hence, was not affected by the limitations therein on the Council's power to impose a commuter tax. As the court explained:

> . . . Having imposed the tax, 61 Stat. at 345, Congress gave the authority to the Council to promulgate rules and regulations to determine the apportionment of the UB Tax, collect the UB Tax, see discussion *supra* Part II.C., and establish the UB Tax rate, § 471(1), 88 Stat. at 1064. The legislation which authorized the Council to

> establish the UB Tax rate was enacted in September 1974, approximately nine months after the passage of the Home Rule Act in December 1973 but before the Home Rule Act became effective in January 1975. This sequence of events demonstrates that Congress had not repealed the Tax Act of 1947 by enacting the Home Rule Act. By giving the Council the right to determine the rate, Congress made it clear that the UB Tax remained in effect.

Pet. App. at 9a (footnote omitted).

Finally, the Benders argue that the decision of the D.C. Court of Appeals is inconsistent with its decisions in *Bishop* and *District of Columbia v. Califano*, 647 A.2d 761 (D.C. 1994). Pet. at 17-18. However, even if this were a reason for this Court's review, the court's decision in the present case is in complete harmony with those cases.

Bishop invalidated an act of the Council that *repealed* the *exemption* contained in the unincorporated business franchise tax for professional and personal-services businesses. In the panel's decision in *Bishop,* which was reinstated by the full court, 411 A.2d at 999, the court, citing statements by members of Congress in the legislative history of the Home Rule Act, held that "by adopting the provision, Congress intended to prevent the District from enacting a commuter tax," 401 A.2d at 957, which the court defined as "a levy by a jurisdiction upon individuals who do not live in that jurisdiction *but work there on a daily basis*." 401 A.2d at 958 (emphasis added). Because the tax at issue in *Bishop* was in reality a tax on the partners of the law firm, who received distributions instead of wages, the court held that it ran afoul of the commuter-tax prohibition. However, nothing in *Bishop* suggests that the District was precluded from collecting

the franchise tax imposed by *Congress* on businesses that were *not* entitled to the professional or personal-services exemption, such as the Benders' businesses.

Likewise, in *Califano*, the court concluded that a franchise tax imposed on a law firm by New York was a tax on "personal income" entitling the firm's District partners to a credit on their individual income taxes for the taxes paid to New York. The New York tax was similar to the professional tax that the Council attempted to impose but that was invalidated in *Bishop*. Again, there is no suggestion that the District could not continue to collect the unincorporated business franchise tax imposed by Congress.

B. The difference in interpretation of District of Columbia law by the D.C. Court of Appeals and the Supreme Court of Virginia does not create a conflict requiring resolution by this Court.

The Benders' primary ground for invoking this Court's discretionary review is that the decision of the D.C. Court of Appeals is in conflict with the decision of the Supreme Court of Virginia in *Mathy v. Commonwealth of Virginia, Dep't of Taxation*, 483 S.E. 2d 802 (Va.), *cert. denied*, 522 U.S. 967 (1997). Pet. at 23, *citing* SUPREME COURT RULE 10(b). However, there is no conflict within the meaning of this rule.[9] Although the courts differed as to their interpretation of the Home Rule Act and the 1947 Tax Act, the decisions do not have

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[9]It is also unclear whether the D.C. Court of Appeals "decided an important federal question" under Rule 10(b). *See Key v. Doyle*, 434 U.S. 59, 67-68 (1977) (holding statute enacted by Congress applicable solely to the District was not a "statute of the United States" within appellate jurisdiction of the Court under former 28 U.S.C. § 1257(1) (1982), which was for questions of national scope).

equal force because the Supreme Court of Virginia is bound to follow decisions of the D.C. Court of Appeals interpreting the law of the District of Columbia.[10]

This Court has held itself bound to the interpretation of state law by the highest court of the state. *See R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 391 (1992) ("In construing the St. Paul ordinance, we are bound by the construction given to it by the Minnesota court."); *Elmendorf v. Taylor*, 23 U.S. 152, 159-160 (1825) ("This Court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the Courts of the State have given to those laws.").

Directly on point, the highest courts of Maryland and Virginia have held that they were bound by the interpretation of the 1947 Tax Act by the D.C. Court of Appeals in *Bishop*. *See King v. Forst*, 391 S.E.2d 60, 62 (Va. 1990) ("We are bound by the interpretation given by the highest court of a sister jurisdiction to the law of that jurisdiction."); *Roach v. Comptroller of the Treasury*, 610 A.2d 754, 757 (Md. 1992) ("While the nature of another jurisdiction's statute for purposes of Maryland law is for this Court to decide, nevertheless, to the extent that we rely on the other jurisdiction's characterization of its statute in deciding that issue of Maryland law, we take the statute with whatever interpretative gloss has been placed upon it by the highest court of the other jurisdiction."). Because these

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[10]Moreover, *Mathy* was wrongly decided because it did not distinguish between a tax imposed by Congress under the 1947 Tax Act and a tax imposed by the Council, but proceeded on the false premise that the unincorporated business franchise tax applicable to the taxpayer had been imposed by the Council.

courts would be similarly bound by the decision of the D.C. Court of Appeals in the present case, there is no true conflict.[11]

The cases the Benders cite are readily distinguishable. In *Monge v. California*, 524 U.S. 721 (1998), there was a conflict among state courts as to whether this Court's holding in *Bullington v. Missouri*, 451 U.S. 430 (1981) – *i.e.*, that the Double Jeopardy Clause prevented imposing the death sentence on a defendant retried for capital murder after receiving a lesser sentence – applied in noncapital cases. In *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 710 (1994), the Court granted certiorari to resolve conflicting interpretations by state courts of an important provision of the federal Clean Water Act. In these cases, the decisions of the highest state courts were entitled to equal deference. In contrast, a decision of the D.C. Court of Appeals interpreting the law of the District of Columbia is entitled to deference by state courts, as well as the federal courts.

Therefore, there is no reason – let alone a "compelling reason," *see* Supreme Court Rule 10 – for this Court to exercise its discretionary jurisdiction to review the decision below.

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[11]The decisions interpreted the holding in *Bishop* – *i.e.*, that the Council's imposition of a franchise tax on professionals such as lawyers was a tax on "personal income" – as meaning that the franchise tax as imposed by Congress on *other* businesses was also a tax on personal income. This extension of *Bishop* was unwarranted because the holding of that case was limited to the "professional tax" imposed by the Council. However, the decision of the D.C. Court of Appeals in the present case has now clarified the law of the District on this question.

C. The argument that the exemption limited to professional and personal-services businesses violates the Equal Protection Clause was not raised below and is without merit because it is rational to treat income derived from personal labors of individuals differently from income derived from business operations.

The Benders argue that the legislative scheme embodied in the 1947 Tax Act, which exempts professional and personal-services businesses but not other unincorporated businesses, violates the Equal Protection Clause of the Fourteenth Amendment.[12] Pet. at 29.

The Benders' constitutional argument should not be considered because it was not presented below but is raised for the first time in their petition to this Court. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 n.16 (1983) (citing cases). Moreover, the argument is without merit.

The Benders argue that there is no rational basis for treating nonresidents engaged in professional or personal-services businesses differently from nonresidents engaged in other unincorporated businesses in the District, noting that "real estate investors are treated differently than lawyers or doctors." Pet. at 29. The argument would apply equally to District residents engaged in these businesses. However, it has long been settled that Congress and state legislatures have broad discretion in creating classifications in taxation as long as they are not

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[12]The Fourteenth Amendment does not apply because the District is not a "state" within its meaning and because the 1947 Tax Act was enacted by Congress. However, equal protection principles are embodied in the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497, 498-499 (1954).

arbitrary. *See United States v. Ptasynski*, 462 U.S. 74 (1983) (upholding exemption in Crude Oil Windfall Profit Tax Act for certain wells located in Alaska); *United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 4 (1970) (upholding "grandfather clause" in federal tax laws exempting state-created nonprofit corporations organized before September 1, 1957, but not those formed after that date); *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 40 (1928) ("The equal protection clause of the Fourteenth Amendment does not preclude a state in imposing taxes from making exemptions, provided the power is not exercised arbitrarily.").

The one case that the Benders cite, *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985), is readily distinguishable. In that case, the Court held that an Alabama statute, which granted a preference to its domestic insurance companies by imposing a substantially lower gross premiums tax rate on them than on out-of-state companies, had no rational basis. The Court held that "Alabama's aim to promote domestic industry is purely and completely discriminatory, designed only to favor domestic industry within the State, no matter what the cost to foreign corporations also seeking to do business there" and "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." *Id.* at 878.

In contrast to the tax invalidated in *Ward*, the unincorporated business franchise tax imposed by the 1947 Tax Act applies equally to residents and nonresidents operating unincorporated businesses in the District. Moreover, the exemption for professional and personal-services businesses is reasonable because income received from those businesses is similar to income otherwise received by individuals primarily as a result of their personal labors, such as wages or self-employment income. It is rational to accord different treatment to investment income

derived from business operations, like that at issue in the present case.[13]

CONCLUSION

The petition should be denied.

Respectfully submitted,

LINDA SINGER
Acting Attorney General
for the District of Columbia

TODD S. KIM
Solicitor General

EDWARD E. SCHWAB
Deputy Solicitor General

*JAMES C. McKAY, Jr.
Senior Assistant Attorney General

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[13] *Cf. Hendrick v. District of Columbia*, 183 F.2d 1002 (D.C. Cir. 1950), in which the D.C. Circuit rejected the argument that a stock brokerage was exempt from the franchise tax because it was a "business which by law, customs, or ethics cannot be incorporated," D.C. Code § 47-1808.01(1) (2005). The court held that while "lawyers and medical doctors who, by reason of the peculiarly confidential and fiduciary nature of their pursuits, are necessarily held to individual responsibility" were exempt, a "stock brokerage is little different from any business whose activities are essentially those of agents for purchase and sale." 183 F.2d at 1003-1004.

Counsel for the District of Columbia
Office of the Attorney General for
the District of Columbia
Office of the Solicitor General
441 Fourth Street, N.W., 6th floor South
Washington, D.C. 20001
(202) 724-5690

**Counsel of Record*

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